

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 JULIO MATA ROJERO,) Civil No. 09cv2047-L(NLS)
12 Petitioner,)
13 v.) **ORDER ADOPTING REPORT AND
14 COLEEN NOLL,) RECOMMENDATION AND
15 Respondent.) DISMISSING FIRST AMENDED
Petition**
16

17 Petitioner Julio Mata Rojero, proceeding in *pro se*, filed a petition for writ of habeas
18 corpus pursuant to 28 U.S.C. Section 2254. The case was referred to United States Magistrate
19 Judge Nita L. Stormes for a report and recommendation pursuant to 28 U.S.C. Section
20 636(b)(1)(B) and Civil Local Rule 72.3. Petitioner subsequently filed an amended petition
21 together with a motion to stay this case and hold it in abeyance while Petitioner exhausts his
22 unexhausted claims in state court. Respondent opposed the motion. Judge Stormes issued a
23 report and recommended denying Petitioner's motion and dismiss the amended petition because
24 Petitioner did not show good cause for failure to previously exhaust his claims and because even
25 if the claims were exhausted, they were time barred.

26 In reviewing a magistrate judge's report and recommendation, the district court "shall
27 make a *de novo* determination of those portions of the report . . . to which objection is made,"
28 and "may accept, reject, or modify, in whole or in part, the findings or recommendations made

1 by the magistrate judge.” 28 U.S.C. § 636(b)(1). Under this statute, “the district judge must
 2 review the magistrate judge’s findings and recommendations *de novo if objection is made, but*
 3 *not otherwise.*” *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir.) (*en banc*)
 4 (emphasis in original); *see Schmidt v. Johnstone*, 263 F. Supp. 2d 1219, 1225-26 & n.5 (D. Ariz.
 5 2003) (applying *Reyna-Tapia* to habeas review). Petitioner filed objections to the Report and
 6 Recommendation.

7 “Habeas petitioners have long been required to adjudicate their claims in state court – that
 8 is, ‘exhaust’ them – before seeking relief in federal court.” *King v. Ryan*, 564 F.3d 1133, 1138
 9 (9th Cir. 2009). A federal court may not grant habeas relief “unless it appears that . . . the
 10 applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C.
 11 § 2254(b)(1)(A). The amended petition contains six grounds for relief; however, none of them
 12 had been presented to the California Supreme Court. To satisfy the exhaustion requirement, a
 13 petitioner must fairly present his federal claims to the highest court with jurisdiction to consider
 14 it, or demonstrate that no state remedy remains available. *Johnson v. Zenon*, 88 F.3d 828, 829
 15 (9th Cir. 1996). Petitioner has not presented any of his claims to the highest court, and he does
 16 not maintain, either in his motion or in his objections, that no state remedy remains available to
 17 him.

18 “District courts have the discretion to hold a mixed petition in abeyance pending
 19 exhaustion of the unexhausted claims.” *Raspberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir.
 20 2006). However, this rule does not extend “to the situation where the original habeas petition
 21 contained only unexhausted claims.” *Id.* “Once a district court determines that a habeas petition
 22 contains only unexhausted claims, it . . . may simply dismiss the habeas petition for failure to
 23 exhaust.” *Id.* Because Petitioner’s amended petition contains only unexhausted claims, his
 24 motion to stay and abey is **DENIED** and the amended petition is **DISMISSED** for failure to
 25 exhaust.

26 In the alternative, assuming for the sake of argument that Plaintiff had exhausted all of his
 27 claims, the court would nevertheless have to dismiss his amended petition as untimely. “In
 28 furtherance of Congress’s desire to accelerate the federal habeas process, AEDPA imposed a

1 one-year statute of limitations on the filing of a federal habeas corpus petition by a state
 2 prisoner.” *Nino v. Galaza*, 183 F.3d 1003, 1004-05 (9th Cir. 1999) (internal quotation marks
 3 and citation omitted); 28 U.S.C. § 2244(d)(1). For prisoners like Petitioner, whose convictions
 4 became final before AEDPA’s enactment, the statute expired on April 24, 1997. *Patterson v.*
 5 *Stewart*, 251 F.3d 1243, 1245 (9th Cir. 2001).

6 Petitioner’s sentence became final in 1994. He filed his first state habeas petition in
 7 California Superior Court on January 5, 1995. It was denied on March 23, 1995. Petitioner did
 8 not pursue habeas review again for six years, until April 29, 2001, when he filed his second state
 9 habeas petition in California Superior Court. It was denied on July 9, 2001. Petitioner then let
 10 more than six years elapse before he again sought habeas review on January 13, 2008, when he
 11 filed a habeas petition in California Court of Appeal. It was denied as untimely on April 30,
 12 2008. On March 10, 2009 he filed a habeas petition in California Supreme Court, alleging only
 13 an ineffective assistance claim. This petition was denied as untimely on August 12, 2009.
 14 Petitioner’s initial petition in this court was filed on September 11, 2009, years after the statute
 15 of limitations had expired. Although the Report and Recommendation addresses the statute of
 16 limitations issues, in his objections Plaintiff does not argue that his federal petition is timely
 17 under any available tolling doctrines. Accordingly, the amended petition is **DISMISSED** on the
 18 alternative ground that it is untimely.

19 Based on the foregoing, Petitioner’s objections are overruled, the Report and
 20 Recommendation is **ADOPTED** as modified herein, and the amended petition is **DISMISSED**.
 21 Based on the reasons stated herein, certificate of appealability is **DENIED**.

22 **IT IS SO ORDERED.**

23 DATED: August 12, 2010

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 25 
 26 M. James Lorenz
 27 United States District Court Judge

28 COPY TO:

29 HON. NITA L. STORMES
 30 UNITED STATES MAGISTRATE JUDGE

31 ALL PARTIES/COUNSEL